

1989

# Roland Webb v. R.O.A. General, Inc. a Utah corporation, William Reagan, individually, and Douglas T. Hall, individually: Brief of Respondent

Utah Court of Appeals

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**BRIEF**

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[ JMENT

IN THE COURT OF APPEALS OF THE STATE OF UTAH

5 89164-CA

DOUGLAS T. HALL, ROLAND WEBB,

Plaintiff-Respondent,

vs.

R.O.A. GENERAL, INC., a  
Utah corporation, WILLIAM  
REAGAN, individually,  
and DOUGLAS T. HALL,  
individually,

Defendants-Appellants.

No. 890164-CA

Priority No. 14b

**BRIEF OF RESPONDENT**

On Appeal From the Judgment of the  
Third Judicial District Court for  
Salt Lake County, State of Utah

Honorable James S. Sawaya, Judge

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**FILED**

**OCT 13 1989**

Mary T. Noonan

IN THE COURT OF APPEALS OF THE STATE OF UTAH

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ROLAND WEBB,

Plaintiff-Respondent,

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IN THE COURT OF APPEALS OF THE STATE OF UTAH

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ROLAND WEBB,	)	
	)	
Plaintiff-Respondent,	)	
	)	
vs.	)	
	)	
R.O.A. GENERAL, INC., a	)	No. 890164-CA
Utah corporation, WILLIAM	)	
REAGAN, individually,	)	
and DOUGLAS T. HALL,	)	Priority No. 14b
individually,	)	
	)	
Defendants-Appellants.	)	

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BRIEF OF RESPONDENT

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JURISDICTIONAL STATEMENT AND CASE HISTORY

Jurisdiction lies with this Court pursuant to Utah Code Ann. § 78-2a-3(2)(j) (Supp. 1989). This appeal is taken from the January 5, 1989 Order by the Third Judicial District Court of Salt Lake County, the Honorable James Sawaya presiding, granting summary judgment in favor of Roland Webb and dismissing the fourth cause of action of defendant R.O.A. General, Inc.'s ("R.O.A.") Counterclaim. The District Court's Order was certified as a final judgment pursuant to Rule 54(b) of the Utah Rules of Civil Procedure.

STATEMENT OF ISSUES

The only issue before this Court on appeal is the Third Statement of Issues set forth in appellant's ("R.O.A.'s") opening brief, i.e.,

Did the trial court err in determining that there was no genuine issue of material fact as to the adequacy of the disclosure made by Webb to the board of directors of Galaxy Outdoor Advertising before allegedly taking advantage of a corporate opportunity?

R.O.A.'s counsel stipulated to the District Court's Order granting Webb leave to amend his reply to R.O.A.'s counterclaim by adding Utah Code Ann. § 78-12-27 as a specific statute of limitations defense to the fourth cause of action of R.O.A.'s Counterclaim. (R. 871, 858-860, 851-856, 974-984)<sup>1</sup> The issue of whether Section 78-12-27 was the applicable statute of limitations and the issue of whether Webb waived his right to rely on the applicable statute of limitations were mooted by R.O.A.'s stipulation to Webb's amended reply and are therefore not before this court on appeal.

#### DETERMINATIVE AUTHORITIES

Assuming R.O.A. is correct that Utah Code Ann. § 78-12-27 is the only applicable statute of limitations defense available to Webb with respect to R.O.A.'s corporate opportunity usurpation claim, that code section, Rule 15(a), Utah Rules of Civil Procedure (which permitted Webb's amended reply pleading Section 78-12-27) and Rule 56, Utah Rules of Civil Procedure are the determinative authorities on appeal. The text of each provision is set forth in the addendum.

#### STATEMENT OF THE CASE

Webb brought this lawsuit against defendants to enforce his statutory right as a shareholder of R.O.A. General, Inc. to inspect R.O.A.'s books and records, to recover from defendants the statutory penalties and other damages resulting from defendants'

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<sup>1</sup>Following Judge Sawaya's ruling that R.O.A.'s alleged fourth cause of action was barred by any applicable statute of limitations, and in light of R.O.A.'s motion to certify the summary judgment as final and appealable under Rule 54(b), Webb moved for leave to amend his reply to R.O.A.'s counterclaim to include Section 78-12-27 as a specifically pleaded statute of limitations defense. At oral argument on said motion, Mr. Fishler, R.O.A.'s counsel, stipulated to the court's entry of an order granting Webb's motion.

violation of the statute (Utah Code Ann. § 16-10-47), and to recover damages from R.O.A. for breach of Webb's employment contract with R.O.A. R.O.A. counterclaimed against Webb, alleging breach of contract and usurpation of a corporate opportunity. This Court previously ruled in favor of Webb on the shareholder issue. Webb v. R.O.A. General, Inc., 773 P.2d 834 (Utah App. 1989). Appellant R.O.A. is concurrent with this appeal, appealing the lower court's order in favor of Webb on the breach of the employment agreement.

Webb's Motion for Partial Summary Judgment, which is the subject of this appeal, was directed to the fourth cause of action in R.O.A.'s Counterclaim, alleging that in 1977 Webb usurped a corporate opportunity of Galaxy Outdoor Advertising ("Galaxy"), a corporation acquired by R.O.A. in 1981. The District Court granted Webb's Motion for Partial Summary Judgment (R. 843-44, 838), concluding in its minute entry dated August 30, 1988, (R. 838) that there was no issue of material fact that "this cause of action and the facts under which it arose existed and was known by the defendant's predecessor in 1977. Either of the statutes discussed would bar it." On September 19, 1988, R.O.A. moved the District Court pursuant to Rule 54(b) of the Utah Rules of Civil Procedure to certify the court's order granting Webb's Motion for Partial Summary Judgment as a final appealable order. (R. 841-42)

On or about January 5, 1989, the District Court issued its formal written order of partial summary judgment, dismissing of R.O.A.'s corporate opportunity usurpation claim. The court also certified its order of summary judgment as a final appealable order pursuant to Rule 54(b), Utah Rules of Civil Procedure. (R. 970-71)



Until Galaxy was acquired by R.O.A. in July, 1981, Webb was at all times a director of Galaxy. (R. 559) Prior to February, 1977, Galaxy entered into negotiations to sell its Idaho division to Cosgriff, Inc. and to sell its Wyoming division to Eldon Palmer and Palmer Outdoor Advertising Inc. ("Palmer"). (R. 560-61, 1023 at p. 11, 571) On or about February 10, 1977, Galaxy's Board of Directors adopted resolutions approving sales of its Idaho and Wyoming divisions to Cosgriff and Palmer, respectively. (R. 571, 574-75) Prior to the adoption of these resolutions, Webb disclosed to the disinterested directors of Galaxy his pending business venture with Eldon Palmer, pursuant to which he would have the opportunity to acquire an equity interest in the Wyoming assets acquired by Palmer. (R. 571-72, 1023 at p. 35-37) Following Webb's disclosure of his participation as an equity partner with Eldon Palmer in acquiring the Wyoming division of Galaxy, the directors informed Webb that Galaxy had no desire to own, control or manage any interest in Palmer or to assume or undertake any further debt obligations with respect to the Wyoming division of Galaxy, and that Webb was free to pursue this opportunity to acquire an equity interest in the Wyoming division for himself. (R. 1023 at p. 13-15; 571-572; 559-564; 574-579) The Wyoming division of Galaxy was sold to Palmer. Webb eventually obtained a 51% equity interest in Palmer in exchange for his guarantee of Palmer's acquisition indebtedness, as disclosed to the directors of Galaxy. (R. 560-562)

On or about July 7, 1981, approximately four years after the Webb/Palmer transaction, R.O.A. acquired Galaxy. Six years thereafter, in 1987, when Webb brought the instant action in the Third Judicial District Court of Salt Lake County, R.O.A. counterclaimed against Webb, contending that Webb's acquisition of his equity interest

in Galaxy's Wyoming division as a partner to Eldon Palmer in February 1977 constituted a usurpation of a corporate opportunity, a claim R.O.A. contends it succeeded to as the purchaser of Galaxy.

As an affirmative defense to this alleged fourth cause of action in R.O.A.'s counterclaim, Webb asserted his statute of limitation defenses under Utah Code Ann. §§ 78-12-23, 25 and 26, on the grounds that R.O.A.'s Counterclaim alleged Webb's breach of fiduciary duty as an "officer" of Galaxy. (R. 292-99)

Webb moved for partial summary judgment on the corporate opportunity usurpation claim on the grounds that (i) the claim was barred by the applicable statute of limitations, and (ii) that as a matter of undisputed fact, Webb made a full and adequate disclosure of his participation as an equity partner in the acquisition of Galaxy's Wyoming division to the Board of Directors of Galaxy prior to acquiring his interest. (R. 580-581, 582-588) R.O.A. opposed Webb's motion for partial summary judgment, contending that he had failed to specifically plead Utah Code Ann. § 78-12-27, as the applicable statute of limitations defense, and that he had therefore waived his statute of limitations defense. R.O.A. further argued that there were genuine issues of material fact as to the adequacy of Webb's disclosure to the Galaxy Board of Directors. (R. 833) Webb's motion for partial summary judgment was argued on August 1, 1988. (R. 838) Judge Sawaya issued a minute entry on August 30, 1988, concluding that it was an undisputed fact that Webb made the necessary disclosures to the Galaxy Board of Directors to trigger the running of any applicable statute of limitations barring R.O.A.'s fourth cause of action. (R. 838)

### SUMMARY OF ARGUMENT

It is unnecessary to address R.O.A.'s arguments that the trial court erred in not finding that Webb failed to plead the applicable statute of limitations defense and therefore waived his right to assert that defense in his reply to R.O.A.'s Counterclaim. R.O.A. has, by stipulation, agreed to the entry of an order permitting Webb to amend his Answer to R.O.A.'s Counterclaim to assert Utah Code Ann. § 78-12-27 (the section R.O.A. claims Webb waived) as a specific affirmative defense. Consequently, the arguments raised by R.O.A. in Points I and II of its original brief are moot. (See Appellant's Brief, pp. 6-11.)

R.O.A. has failed to controvert the fact that Webb fully disclosed to the directors of Galaxy his participation as an equity partner in the acquisition of Galaxy's Wyoming division sufficient to commence the running of the statute of limitations against Galaxy and any of its successors as to any corporate opportunity usurpation claims.

### ARGUMENT

#### POINT I. R.O.A.'s Argument That Webb Waived His Statute of Limitations Defense is Moot.

The fourth cause of action of R.O.A.'s Counterclaim alleges that Webb, while an officer of Galaxy, violated his fiduciary duty to Galaxy and usurped a corporate opportunity by acquiring an interest in Palmer, which interest he ultimately sold at a profit. This claim, as pleaded by R.O.A., was based on Webb's status as an officer of Galaxy and his alleged violation of his fiduciary duties as an officer. Webb asserted as

an affirmative defense to R.O.A.'s claim the statute of limitation defenses under Utah Code Ann. § 78-12-23 (actions upon obligations in writing), § 78-12-25 (actions upon obligations not founded upon written instruments and actions for relief not otherwise provided by law), and § 78-12-26 (actions for fraud). R.O.A. contended in the summary judgment proceedings that the corporate opportunity usurpation claim, although articulated as an action against Webb as an officer, was really asserted against him as a director. R.O.A. argued that Section 78-12-27 (actions against directors and shareholders) was therefore Webb's only applicable statute of limitations defense and that Webb waived it by failing to plead it specifically. R.O.A. makes these same arguments in Points I and II of its brief in this appeal.

These arguments are moot. By stipulation of R.O.A.'s counsel and by order of the District Court, Webb has amended his reply to R.O.A.'s counterclaim to assert Section 78-12-27 as a statute of limitations affirmative defense.

**POINT II. It is Undisputed That Webb Disclosed to the Galaxy Directors His Acquisition of An Equity Interest in Palmer.**

Utah Code Ann. § 78-12-27 provides:

Actions against directors or stockholders of a corporation to recover a penalty or forfeiture imposed, or to enforce a liability created, by law must be brought within three years after the discovery, by the aggrieved party, of the facts upon which the penalty or forfeiture attached, or the liability accrued. (emphasis added)

In cases where breach of a director's fiduciary duty is alleged, the Utah Supreme Court has stated that "the statute begins to run from the time that the complaining party discovered the wrongs complained of or when he was apprised of such facts and circumstances with respect thereto as would put a person of ordinary intelligence and

prudence upon inquiry." Jones Mining Co. v. Cardiff Mining & Milling Co., 56 Utah 449, 191 P. 426, 429 (1920)(citations omitted). The Utah Supreme Court has further stated:

A corporation, being once charged with notice of the character of a transaction, continues to be affected by such notice whatever changes may occur in the personnel of its working force. ". . . A fortiori, notice to the board of directors of a fact, at the time of a transaction in regard thereto, is notice to the corporation, and no subsequent change of directors can require a new notice of such fact . . ."

Microbiological Research Corp. v. Muna, 625 P.2d 690, 695 (Utah 1981) (quoting 3 Fletcher, Cyclopedia of Corporations, § 801 (rev. perm. ed. 1975)). Based on the undisputed record, the District Court correctly concluded that Webb's disclosure of his participation in the acquisition of Galaxy's Wyoming division to the directors of Galaxy caused the statute of limitations to run against Galaxy as well as its successor, R.O.A.

The deposition of George Hatch (R. 1023) and the affidavits filed in support of Webb's Motion for Summary Judgment establish uncontrovertibly that on or before February 10, 1977, more than ten years before R.O.A. filed its counterclaim in this action, Webb informed the directors of Galaxy of his opportunity to obtain an equity interest in Palmer in connection with the sale of Galaxy's Wyoming division. (R. 1023 pp. 9-15, 25-26, 34-37); (R. 571); (R. 561-562); (R. 574-575) At that time, the disinterested directors of Galaxy declined on behalf of Galaxy to take advantage of that opportunity and expressly approved Webb's doing so. (R. 572-575)

The only evidence submitted by R.O.A. in an attempt to controvert the testimony of George Hatch, Blaine Glasmann and Roland Webb in the summary

judgment proceedings was the Affidavit of William Reagan (R. 610-11) and the Affidavit of Richard B. Paxman. (R. 607-608) The Affidavit of William Reagan not only fails to controvert the testimony of George Hatch, Blaine Glasmann and Roland Webb that a full disclosure of Webb's transaction with Palmer was made to the Galaxy Board of Directors prior to the consummation of the transaction, it actually supports Webb's statute of limitations defense. Mr. Reagan states in his Affidavit:

5. That in June of 1981, after the above-referenced meeting of the board of directors [of Orpheum], Mr. Jeff Hatch stated to me that the board of directors was advised for the first time, by Robert Glassman [sic], son of William Glassman [sic], that he had gained knowledge that Mr. Webb had previously obtained 51% of Palmer Advertising in Wyoming, surreptitiously. This fact was very disturbing to some of the board members of Orpheum, which was 80% stockholder of Galaxy, and after learning of his involvement they refused to carry a contract for the sale of Galaxy to Reagan under the terms and conditions previously agreed upon.

(R. 611)

Aside from the fact that Mr. Reagan's testimony is double hearsay, it recounts only the alleged reaction of "some of the board members of Orpheum" when the issue in this case is Webb's disclosure to board members of Galaxy. Whether or not the board members of Orpheum were "disturbed" with Webb's transaction is irrelevant.

Mr. Reagan's affidavit further demonstrates that Mr. Reagan, by his own admission, was aware of Webb's alleged "surreptitious" acquisition of 51% of Palmer as early as June of 1981. Consequently, under Jones Mining Co., 191 P. 426 at 429, the statute of limitations on any claim assertable by R.O.A. or Mr. Reagan with respect to Webb's transaction with Palmer began running in June of 1981.

Richard B. Paxman's Affidavit is likewise based on hearsay and deals entirely with Orpheum Corporation as opposed to Galaxy matters. In Mr. Paxman's affidavit, Mr. Paxman states:

6. That in the late spring or early summer of 1981, your affiant was present at an informal meeting of George Hatch, Jeff Hatch and affiant at the KALL Radio Station in Salt Lake City, Utah. At this meeting your affiant indicated to the Hatches his surprise at learning that Roland Webb had obtained an interest in Palmer Outdoor Advertising. Mr. George Hatch made the comment that "Yes, I was quite surprised to learn of this myself," and seemed quite put-out by this development. Jeff Hatch made no comments concerning George Hatch's statement.

(R. 608)

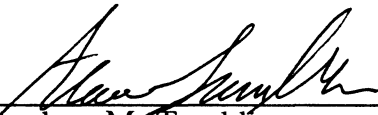
No testimony or other evidence was submitted by Appellants in the summary judgment proceedings to dispute the facts on which the District Court concluded that Appellants' claims are barred by the statute of limitations.

#### CONCLUSION

Based on the foregoing, the District Court correctly concluded that any usurpation claim alleged by R.O.A. as a successor in interest to Galaxy is barred by the statute of limitations which began to run on or before February 10, 1977.

DATED this 13<sup>th</sup> day of October, 1989.

LeBOEUF, LAMB, LEIBY & MacRAE

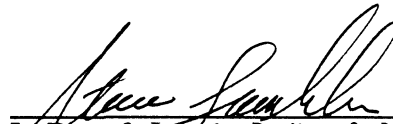
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## CERTIFICATE OF SERVICE

I hereby certify that four copies of the foregoing Brief of Respondent was served this 13th day of October, 1989, by depositing same in the United States mails, first class, postage prepaid, addressed to the following:

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LeBoeuf, Lamb, Leiby & MacRae



## ADDENDUM

### UTAH CODE ANN. §78-12-23

**Within six years – Mesne profits of real property --  
Instrument in writing – Distribution of criminal proceeds to  
victim.**

Within six years:

- (1) An action for the mesne profits of real property.
- (2) An action upon any contract, obligation, or liability founded upon an instrument in writing, except these mentioned in Section 78-12-22.
- (3) An action instituted under Section 87-11-12.5 regarding distribution of criminal proceeds to any victim.

### UTAH CODE ANN. §78-12-25

**Within four years.**

Within four years:

(1) An action upon a contract, obligation, or liability not founded upon an instrument in writing; also on an open account for goods, wares, and merchandise, and for any article charged on a store account; also on an open account for work, labor or services rendered, or materials furnished; provided, that action in all of the foregoing cases may be commenced at any time within four years after the last charge is made or the last payment is received.

(2) A claim for relief or a cause of action under the following sections of Chapter 6, Title 25, the Uniform Fraudulent Transfer Act;

(a) Subsection 25-6-5(1)(a), which in specific situations limits the time for action to one year, under Section 25-6-10;

(b) Subsection 25-6-5(1)(b); or

(c) Subsection 25-6-6(1).

(3) An action for relief not otherwise provided for by law.

UTAH CODE ANN. §78-12-26

**Within three years.**

Within three years:

(1) An action for waste, or trespass upon or to real property; except that when waste or trespass is committed by means of underground works upon any mining claim, the cause of action does not accrue until the discovery by the aggrieved party of the facts constituting such waste or trespass.

(2) An action for taking, detaining, or injuring personal property, including actions for specific recovery thereof; except that in all cases where the subject of the action is a domestic animal usually included in the term "livestock," which at the time of the loss has a recorded mark or brand, if the animal strayed or was stolen from the true owner without the owner's fault, the cause does not accrue until the owner has actual knowledge of such facts as would put a reasonable man upon inquiry as to the possession of the animal by the defendant.

(3) An action for relief on the ground of fraud or mistake; except that the cause of action in such case does not accrue until the discovery by the aggrieved party of the facts constituting the fraud or mistake.

(4) An action for a liability created by the statutes of this state, other than for a penalty or forfeiture under the laws of this state, except where in special cases a different limitation is prescribed by the statutes of this state.

(5) An action to enforce liability imposed by Section 78-17-3, except that the cause of action does not accrue until the aggrieved party knows or reasonably should know of the harm suffered.

UTAH CODE ANN. §78-12-27

**Action against corporate stockholders or directors.**

Actions against directors or stockholders of a corporation to recover a penalty or forfeiture imposed, or to enforce a liability created, by law must be brought within three years after the discovery, by the aggrieved party, of the facts upon which the penalty or forfeiture attached, or the liability accrued, and in case of actions against stockholders of a bank pursuant to levy of assessment to collect their statutory liability, such actions must be brought within three years after the levy of the assessment.

## RULE 15(a) UTAH RULES OF CIVIL PROCEDURES

### **Amended and supplemental pleadings.**

(a) **Amendments.** A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.